

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1098

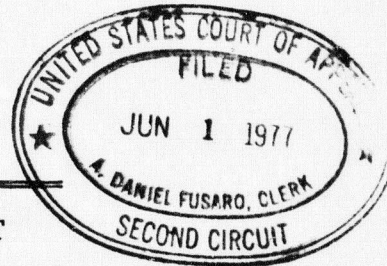
To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
:
-against-
:
VICTOR RAMIREZ,
:
Defendant-Appellant.
:
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B P/S
Docket No. 77-1098

BRIEF FOR APPELLANT



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
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QUESTIONS PRESENTED

1. Whether it was error to admit the tapes and transcripts of the informant's conversations on August 15, 20, and 22 because there was no proof of the accuracy or reliability of the tapes and because it was inevitable that the jurors would consider the informant's statements for their truth.
2. Whether the Government's failure to take measures to preserve the informant's availability or to allow defense counsel to preserve the informant's testimony requires dismissal of the indictment.
3. Whether the trial judge's failure to instruct the jurors on voice identification and his improper response to the jurors' requests require reversal of the judgment.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lawrence W. Pierce) rendered on January 31, 1977, after a trial by jury, convicting appellant Victor Ramirez of conspiring to distribute and possessing with intent to distribute heroin (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846) (Count One), and sentencing him to four years' imprisonment and three years' special parole.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel for Mr. Ramirez on his appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Indictment and Pre-Trial Proceedings

On March 25, 1976, an indictment* was filed charging appellant Ramirez and co-defendant Herminio Gutierrez,** along with others "unknown," with conspiring to distribute and pos-

*The indictment is reproduced as B to the separate appendix to appellant's brief.

**Since Gutierrez was a fugitive at the time of appellant's trial, appellant Ramirez was tried separately.

sess with intent to distribute heroin (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846) (Count One), and the actual distribution of that drug on August 15, 1975 (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. §2) (Count Two). After the arrest of appellant Ramirez, and prior to the filing of the indictment, appellant's trial counsel wrote the Assistant U.S. Attorney then in charge of the prosecution, informing him that appellant intended to seek an order regarding revelation of the informant's identity and requesting the Government's assistance in locating him* (Exhibit A, Document #17 to the Record on Appeal). Moreover, the letter stated:

A further reason for this letter is to ask that you immediately begin to undertake measures calculated to insure that the Government will be in a position to comply with the order I intend to seek.

During the course of an informal discovery meeting between Assistant U.S. Attorney Kaufman and defense counsel, the Assistant U.S. Attorney refused to divulge the informant's name and address or to make the informant available for an interview until seven days prior to trial. In a letter dated April 15, 1976, trial counsel indicated that the prosecutor's "approach will not afford ... sufficient time to prepare Mr. Ramirez' defense..." (Exhibit A, ¶20, Document #15 to the Record on Appeal).

*This letter, dated March 4, 1976, is reproduced as D to the separate appendix to appellant's brief.

Because the Government's informal discovery response was unsatisfactory to the defense, trial counsel, in a written motion dated May 10, 1976, requested, inter alia, the informant's name, address, and background information (Document #15 to the Record on Appeal). In response, the Government revealed that, after two unsuccessful attempts on the informant's life one week earlier, on April 18, 1976, the informant had been killed (§8, Document #16 to the Record on Appeal).

Subsequently, defense counsel moved to dismiss the indictment, indicating that, through the informant's testimony, appellant had "intended to persuade the jury at trial that he was the victim of an entrapment" (§7, Document #19 to the Record on Appeal). Thus, defense counsel argued that dismissal of the indictment was necessary in this case since the Government had failed to take appropriate measures to insure the informant's availability for trial.*

The District Court denied the motion to dismiss. While requesting guidance from "the Circuit" (T.8),** the District

*Further, trial counsel contended that the Government's actions precluded the defense from taking appropriate measures to preserve the informant's testimony. Thus, counsel argued that if the Government had advised the defense of the attempts on the informant's life, the defense could either have asked that the informant be held as a material witness or deposed him (Transcript of November 22, 1976, at 8-9).

**Numerals in parentheses preceded by "T" refer to pages of the trial transcripts.

Court refused to impose upon the Government any affirmative responsibility to preserve the informant's availability or to divulge sufficient information to allow the defense to preserve the testimony (T.7-8, 73).*

However, during further discussion relating to the informant, the District Court expressed concern that, while the informant himself was unavailable, his voice had been perpetuated on tapes the Government intended to offer in evidence. In light of this circumstance, the District Court indicated that it would consider instructing the jury that the informant's recorded statements could be considered only "as it lends meaning to the rest of the conversation," although the judge was "not sure that that is a meaningful kind of request here" (T.9).

*The District Judge stated:

[I]t would be possible to prevent the Government from presenting some of the evidence which it has simply by doing away with the witness. Now, that is a practical consideration which I will look to the Circuit to resolve....

(T.8).

B. The Trial

The Government's theory at trial was that, as part of appellant's participation in a conspiracy to distribute heroin on the Lower East Side of New York during the summer of 1975, on August 15 of that year, appellant Ramirez knowingly sold approximately 101 grams of heroin to the informant, Rene Rivera, for \$6,000. New York City police officer John McHale testified that on August 15, 1975, he and two other officers met with the informant (T.38), at which time they equipped him with a Nagrastatic recording device* and gave him \$5,000 with which to purchase narcotics (T.41). McHale testified that he then followed the informant and, later that day, observed the informant and co-defendant Gutierrez talking (T.48, 57). Further, McHale stated that he saw appellant Ramirez in a brown Cadillac bearing license plate number 406YCO (T.50).** According to McHale, on August 20, 1975, he again equipped the informant with a Nagra recorder, gave him \$1,000, and saw the informant and co-defendant Gutierrez meet (T.61-63, 79-80).

Outside the jury's presence and over objection, the following day the District Court ruled that the tapes with the informant's voice were admissible (T.71-73). However, the

*The Nagrastatic device records, but does not transmit, conversations (T.40).

**The license plates, which were seized during appellant's arrest, were entered into evidence (T.127).

judge indicated that the jury would be instructed that the informant's statements were not to be considered for their truth, "but for the fact of having been asserted," and to enable the jurors "to have some understanding of what [the informant's and the co-defendant's] answers suggest to them" (T.73-74, 270).

The Government's case then proceeded. New York City detective Raggett testified that on August 22, 1975, he equipped the informant with a Nagra recorder, and later that day saw the informant and co-defendant Gutierrez in the informant's car (T.85-86, 93-94). Over defense objections, the reels of tape involving the informant's recorded conversations on August 15, 20, and 22, 1975, were admitted in evidence (T.87-88, 109-110, 317-318).

Drug Enforcement Administration agent William Mockler testified that at approximately 7:00 p.m. on August 15, 1975, he saw appellant Ramirez in the brown Cadillac, which was parked on Stanton Street (T.102). According to Mockler, appellant Ramirez then got out of the automobile and went into a courtyard at 195 Stanton Street (T.105-106), returning to the street with the informant (T.106). Mockler stated that appellant Ramirez then went back into the courtyard of the building (T.106, 138-139), where he and the informant could not be seen (T.103).

Mockler testified that shortly thereafter he met with the informant, who gave the agent a bag containing a substance

later identified as heroin (T.106-108).^{*} Despite the fact that he had heard appellant Ramirez speak only in English for approximately an hour (T.113) eight months before he listened to the tapes (T.129), and despite the fact that the tapes were in Spanish and the agent spoke only a little Spanish (T.120), Mockler testified that he recognized the voices of appellant Ramirez and co-defendant Gutierrez on the tape of August 15, 1975^{**} (T.118-119, 140).

After Mockler testified, the District Court denied trial counsel's prior request that, because the informant was effectively testifying through statements recorded on the tapes, impeachment of the informant's credibility should be permitted by showing the informant's prior criminal record. Thus, the District Judge held that, since the informant's statements were not offered for their truth, the informant's credibility

^{*}The agent also stated that the informant no longer had the \$5,000 he had previously been given (T.107).

^{**}Because the tapes were in Spanish, and therefore could not be understood by the jurors, it was agreed between counsel that the tapes would not be played except at the jurors' specific request (T.311). Instead, written transcripts of the relevant portions of the tapes were used and entered into evidence as part of the Government's case (GX 5-9). However, the transcripts, as well as the tapes themselves, were entered into evidence over defense counsel's objections (T.310). (Numerals in parentheses preceded by "GX" refer to numbers of Government exhibits at trial.)

Mockler also testified that the transcripts identified as GX 5 and GX 7 correctly transcribed the Spanish words that were audible on the relevant tape (T.116) and that the transcripts correctly assigned the statements made to the proper declarant (T.117-119).

was not at issue (T.145, 274, 276). Defense counsel vigorously objected to this ruling, arguing that the jurors would be unable to make the distinction between those statements offered for their truth and those that were not, and that the informant's unavailability unfairly insulated his recorded statements from cross-examination (T.8, 145-146, 272-273, 276).*

Two participants in the narcotics trade in New York -- Raymond Valentine and Benito Cruz -- also testified as part of the Government's case. Valentine stated that he had been convicted of four different crimes, including assaulting a police officer, as well as numerous narcotics violations, and that the Government had promised to reveal Valentine's cooperation to his sentencing judge and to the Parole Board (T. 150-157, 192-204). He testified that all during the month of August 1974 (T.189) his former narcotics supplier no longer had drugs to sell (T.160-161, 204). As a result, Valentine purchased heroin from co-defendant Gutierrez six times (T.164, 166-189). According to Valentine, appellant Ramirez participated in three of these transactions (T.176-178, 182-187, 188). On cross-examination, this testimony was impeached by Valentine's prior testimony at an unrelated trial that his narcotics

*Defense counsel felt that impeaching the informant's credibility was so important to his case that, at one point, he offered to waive certain objections to the tapes if the District Court allowed the impeaching material into evidence.

supplier could not supply him with drugs for at most one week (T.205).*

Benito Cruz testified that he had been convicted of three crimes (T.228-230, 245-247) and had been dealing in narcotics and stolen property for approximately five years (T.235, 246-254, 257-259). During 1973 Cruz was in partnership in the narcotics trade with Fernando Gallardo, and later became Gallardo's customer (T.235, 238). According to Cruz, in August 1975 he heard co-defendant Gutierrez say that Gutierrez made a lot of money but had to share it with his partner, Victor (T.241, 245). Further, Cruz testified that he himself had sold more than 100 kilos of heroin (T.259).**

New York City police detective Raymond Vallely testified that on August 15, 1975, on two different occasions, he saw the informant and co-defendant Gutierrez talking (T.327). The transcript of these conversations, prepared from the tapes already in evidence, were then read to the jurors (T.328, 331).

*Valentine testified that he did not remember this prior testimony (T.205).

**Margarita Cartagena testified that she transcribed the Nagra tape recordings previously admitted in evidence, and translated portions of those tapes from Spanish into English (T.286-287). Cartagena prepared the transcripts of the relevant conversations (GX 5-9) (T.287) with the Spanish text appearing next to the English translation (T.288). She also stated that Agent Mockler had identified the voices on parts of the tapes (T.291) and that, as a result of Mockler's identification, she was able to recognize the same voices on other portions of the recordings (T.292).

The first transcript (GX 5) indicated that the informant asked co-defendant Gutierrez how much he charged for "one-eighth," and that after Gutierrez explained the price, the informant told the co-defendant that he could pay \$5,000 as a down payment. After further discussions relating to the contemplated transaction, the informant agreed on the time of meeting and confirmed the amount of payment. In a second conversation between Gutierrez and the informant later that day, the informant once again confirmed the arrangements and method of payment (GX 6).

Vallely confirmed Agent Mockler's previous testimony, stating that he saw appellant Ramirez and the informant enter a building on Stanton Street (T.335) and that he saw appellant leave the building holding money in his hands (T.336, 338).*

A transcript of a conversation (GX 7) which the Government contended was recorded during the transaction that was the subject of Count Two of the indictment, was then read to the jurors (T.340). The transcript revealed that an unidentified male participated in the conversation and was present in the courtyard at 195 Stanton Street, and that the informant stated that he still owed \$1,000.

*Photographs of some of the events Vallely described were admitted in evidence (T.340).

Vallely also stated that the wearer of a Nagra recorder could stop and start the machine (T.341).*

On summation, the Assistant U.S. Attorney argued that the five transcripts and taped conversations involving the informant were "crucial evidence" in the case (T.382). Indeed, portions of four of these transcripts were then read to the jurors (T.384-386, 387, 390-392, 394-395).** Thus, despite the District Judge's prior instructions that the informant's statements were not to be considered for their truth, the Assistant U.S. Attorney told the jurors that the informant's statements on the tape were proof of an agreement to purchase narcotics and to pay \$5,000 as a down-payment (T.387-387); the later confirmation of that agreement (T.387); the narcotics sale itself (T.395); and the final payment for the drugs (T.395).

*Two remaining transcripts (GX 8 and GX 9) were subsequently read to the jurors (T.349). These conversations were between the informant and co-defendant Gutierrez. The informant told Gutierrez that the "last material" was "a trifle short," but "good" (GX 8), and stated, "Here are the \$1,000." Future transactions were also discussed. The last transcript involved a discussion of the August 20 payment of \$1,000, and the statement by the informant that he had been robbed.

**This portion of the Assistant U.S. Attorney's summation is reproduced as "E" to the separate appendix to appellant's brief.

Defense counsel argued that the evidence was best analyzed in terms of two separate aspects -- the Cruz and Valentine testimony, and proof of the August 15 transaction. Thus, counsel argued that, in light of their demeanor, inappropriate behavior at trial, and the impeachment of their credibility, the testimony of Valentine and Cruz should be rejected by the jurors (T.401-416). Further, counsel contended that Agent Mockler's identification of appellant's voice was unreliable in light of the eight-month delay between Mockler's hearing of appellant's voice in English and his listening to the tapes in a foreign language (T.417-419).*

C. The Charge** and the Jurors' Deliberations

Prior to the charge, defense counsel, stating that voice identification was a significant issue in the case, requested that the judge instruct the jurors about how they were to determine whether the Government had satisfied its burden of proving the identification of the voices on the tapes (T.444).***

*During the course of his summation, defense counsel told the jurors "to look at the photograph [in evidence] and see if it depicts [appellant Ramirez] counting money" (T.424).

**The complete charge is reproduced as C to the separate appendix to appellant's brief.

***Specifically, trial counsel requested "a charge with respect to voice identification, that you specifically tell [the jurors] that they have to be convinced of the voice identification beyond a reasonable doubt" (T.444).

Over counsel's objection (T.444), the District Court rejected the requested instruction.

During the course of his charge, Judge Pierce told the jurors:

There is a dispute between the parties as to whose voices are on the tapes, and also as to what was said by each speaker, and as to whether the transcripts set forth as fully as possible all that can be heard on the tapes and understood from listening to the tapes.

(T.459).

The jurors were told that the tapes were available to them and that they had to determine these questions of fact (T.459-460).

During deliberations, at their request, the jurors were given the transcripts of the recorded conversations involving the informant and the photographs in evidence (T.510, 512). Shortly thereafter the jurors requested that a magnifying glass be provided for their use. Over defense counsel's objections that the magnifying glass might distort the photographs that had already been entered in evidence (T.513), the District Court complied with the jurors' request (T.514).

After deliberations continued on the following day, the jurors requested that the testimony of Valentine and Cruz be re-read to them (T.519) (Court Exhibit #12). The jurors repeated this request in another note to the District Judge, and also requested that the testimony of Agent Mockler be read and that the tape that involved the informant's conversation about the August 15 purchase of narcotics be played for them (T.520)

(Court Exhibit #14).*

The District Judge then indicated to the jurors that he would comply with their various requests by giving additional instructions, reading the agent's testimony, and playing the tape. Judge Pierce then stated: "Then, if you still wish Cruz and Valentine's testimony, that will be available to you as per your request" (T.522). After various instructions and the re-reading of testimony, the District Judge again told the jurors that the Valentine and Cruz testimony would not then be read to them, but that if they still wanted it read, they would be asked to submit a third request (T.546). Defense counsel objected to the failure to re-read the testimony of Valentine and Cruz, contending that the jurors had already expressed a clear desire to hear this testimony and that the court's failure to comply with their request may have unintentionally suggested that a re-reading of the testimony was unnecessary (T. 547).

After further deliberations, appellant was found guilty of conspiracy (Count One). The jurors could not, however, agree on a verdict on the charge involving the sale of narcotics on August 15, 1975 (Count Two) (T.557).**

*The jurors asked that the testimony of Cruz and Valentine be read to them after they had heard Mockler's testimony and the informant's recorded conversation.

**The District Court's failure to allow defense counsel to impeach the informant by proving the informant's prior criminal record was the subject of a post-trial motion. The annexed affidavit revealed that the informant had been convicted of narcotics offenses, assault, and murder.

ARGUMENT

Point I

IT WAS ERROR TO ADMIT THE TAPES AND TRANSCRIPTS OF THE INFORMANT'S CONVERSATIONS ON AUGUST 15, 20, AND 22 BECAUSE THERE WAS NO PROOF OF THE ACCURACY OR RELIABILITY OF THE TAPES AND BECAUSE IT WAS INEVITABLE THAT THE JURORS WOULD CONSIDER THE INFORMANT'S STATEMENTS FOR THEIR TRUTH.

A. The tapes and transcripts were inadmissible.

During the trial, the Government introduced into evidence the tapes (GX 1-3) and transcripts (GX 5-9) of five conversations in which the informant, Rene Rivera, participated. All these conversations were recorded on a Nagra recording device, which does not transmit, and the conversations were not overheard by anyone. The Government contended that four of these conversations were between the informant and co-defendant Gutierrez, who was a fugitive at the time of trial, and that the fifth conversation was between the informant and appellant, and reflected the sale which was the subject of Count Two of the indictment.

During trial, defense counsel challenged the accuracy of the tapes, the accuracy of the voice identification, and the correctness of the transcription of the tapes. Counsel argued that the tapes were inadmissible because the informant's unavailability precluded cross-examination about the tapes and

the making of them. Defense counsel's position was correct, and Judge Pierce's refusal to exclude the tapes and transcripts was error.

The requirement of establishing a "foundation" to justify the admission of a tape into evidence to corroborate a witness' testimony is clearly established. United States v. McKeever, 169 F.Supp. 426, 430 (S.D.N.Y. 1958), cited approvingly in United States v. McKeever, 271 F.2d 669, 675 (2d Cir. 1959); Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956); United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); McKeeman v. Commercial Credit Equipment Corp., 320 F.Supp. 938 (D.Neb. 1970). A fortiori, these requirements also apply when the tape is used not merely to corroborate testimony of witnesses, but, as is permitted, is admitted as independent evidence. United States v. McMillan, supra; United States v. Bonanno, 487 F.2d 654, 659-660 (2d Cir. 1973). The burden of proving the proper foundation for the admissibility of tapes is upon the Government, and it must establish the tapes' authenticity and reliability. United States v. Knohl, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967). Under McKeever, the Government must show, inter alia, that the operator of the equipment was capable of operating it, that the recording made is authentic and correct, that the recording has not been altered by additions or deletions, and that the recording itself is preserved. As the judge in McKeever stated:

The reliability of the resulting recording must be established before the recording itself can be admitted. The "credibility" so to speak, of the recording itself, its accuracy and completeness, are left to the trial judge to determine as an initial or preliminary question of fact. The functional importance of foundation proof of accuracy and authenticity is highlighted by the obvious circumstances that the mechanical, physical recording cannot be cross-examined.

United States v. McKeever,
supra, 169 F.Supp. at 431 n.1.

As in McKeever, the critical factors of the accuracy and reliability of the tapes were assumed to be necessary by the Supreme Court in discussing the admissibility of tapes in United States v. White, 401 U.S. 745, 753 (1971); see also United States v. Osser, 483 F.2d 727 (3d Cir.), cert. denied, 414 U.S. 1028 (1973).

Here, no one could testify to the accuracy of the tapes and transcripts. The operator of the recorder -- the informer -- was unavailable, and the co-defendant who participated in four of the conversations had fled. While appellant was not present during these discussions, the tapes mention the name "Victor" in connection with a heroin transaction involving a large amount of money (GX 5, 8) as well as discussions about and confirmation of payments (GX 6, 8, 9), "quarters" (GX 8), and sales (GX 8). Thus, counsel was unable to cross-examine the informant as to whether the tape accurately reflected the conversations, as to whether the informant might possibly have manipulated the recording device, as to a complete explan-

ation of the underlying events, and as to whether appellant was the person referred to in the co-defendant's statements.

Similarly, there was no proof of the accuracy of the conversation the Government contended reflected the August 15 sale (GX 7). This tape was the only one in which it was asserted that appellant was a party to the conversation. However, the transcript reflects that a third, unidentified person was present during the conversation.* As defense counsel argued, this circumstance raises the real possibility that the transcripts inaccurately reflect the events in question (T.420).

The impact of the tapes on the jury was inevitably substantial. In his summation, the Assistant U.S. Attorney referred to the tapes a number of times, stating that they were "crucial" evidence of a narcotics transaction and confirmation of the sale and payments. Further, he quoted the informant's, Gutierrez', and appellant's statements from four of the transcripts (T.384-386, 387, 390-392, 394-395). The jurors, at their request, were given copies of the transcripts. Despite the fact that they knew the recording was in Spanish, they also requested that the tape of the informant's conversations during the August 15 transactions be played.

*Despite this tape, the jurors were unable to render a verdict on Count Two, which involved charges of the actual sale of narcotics. However, the tape and transcript were also available for their consideration in connection with Count One, the conspiracy count.

Thus, the tapes and transcripts were critical evidence in this case. Defense counsel correctly argued that they were not admissible. Because the Government failed to sustain its burden on the question of admissibility by laying a proper foundation, the tapes and transcripts should not have been allowed in evidence.

B. Assuming, arguendo, that the tapes of the informant's conversations were properly admitted in evidence, the District Court impermissibly precluded the defense from impeaching the informant's credibility.

Because defense counsel felt that the deceased informant's statements, preserved on the tapes, were crucial to the jurors' determination, and that the informer would effectively be testifying without being subject to cross-examination, counsel repeatedly requested that he be allowed to impeach the informant by showing his prior criminal record, which included narcotics offenses, assault, and murder. This request was erroneously denied and requires reversal.

The admission of hearsay statements places in issue the credibility of the out-of-court declarant, and consequently permits "impeachment in the appropriate ways." 3A Wigmore, EVIDENCE §884 (Chadbourn rev. 1970); Rule 806, Federal Rules of Evidence; United States v. Puco, 476 F.2d 1094, 1105 (2d Cir. 1973), cert. denied, 414 U.S. 844 (1974). While the judge here told the jurors that they should not consider the infor-

mant's statements for their truth, but only as an aid in understanding the statements of other individuals, including appellant (T.504), defense counsel argued that the jurors would be unable to make this distinction. Indeed, this Court has previously indicated that the analysis used by counsel was correct. Thus, in United States v. McKeever, supra, 271 F.2d at 676, where the defense sought to introduce the tape of a conversation between the defendant and a Government witness, this Court agreed with the District Court's decision not to admit the tapes, stating that "it is doubtful whether any instruction by the trial judge that the jury should not consider McKeever's taped statements as bearing on the truth or falsity of his defense would have been adequate to preserve such consideration." Id., 271 F.2d at 676; cf. Bruton v. United States, 391 U.S. 123, 137 (1968).

Here, the co-defendant Gutierrez' statements were admissible for their truth under the "co-conspirator's exception" to the hearsay rule. While the District Court told the jurors that the informant's statements were to be considered only "for the fact of whether it was said or not," as an aid "in understanding statements made by other persons" (T.504), the Assistant U.S. Attorney himself was unable to make the distinction. Thus, he read to the jurors the informant's inquiry about the drugs and the informant's statements to the co-defendant that the informant would first pay \$5,000 and then \$1,000 (T.385), and subsequently twice agreed on the arrangements for payment

(T.386-387); that the informant had the money immediately prior to the sale (T.391); and that the informant later confirmed the August 15 sale (T.394) and final payment (T.395). Thus, during summation, the Assistant U.S. Attorney disregarded the distinction Judge Pierce had made by this reading from these transcripts and by arguing that the statements, including the informant's, were proof of the Government's case (see Point I, supra).

The informant's credibility was in fact an issue in the trial, and his statements were inevitably considered by the jurors for their truth. Defense counsel's request to be permitted to impeach the informant's credibility was therefore improperly denied. Moreover, as in McKeever, the District Court erred in permitting the tapes into evidence.

Point II

THE GOVERNMENT'S FAILURE TO TAKE
MEASURES TO PRESERVE THE INFORMANT'S
AVAILABILITY OR TO ALLOW DEFENSE COUNSEL
TO PRESERVE THE TESTIMONY REQUIRES DIS-
MISSAL OF THE INDICTMENT.

Prior to the filing of the indictment, defense counsel, by letter dated March 24, 1976, informed the Government that the informant's identity was necessary to the defense and that an order would be sought to compel its disclosure and to require the Government's assistance in locating this witness. Further, counsel requested that the Government "immediately begin to undertake measures calculated to insure that the Government will be in a position to comply with the order...." The Government refused to divulge the informant's name or permit an interview until seven days prior to trial. In response to a formal discovery motion involving these questions, the Government then revealed that after two unsuccessful attempts on the informant's life, the informant had been killed almost one month after counsel's March 24 letter.

Based on these facts, appellant subsequently sought dismissal of the indictment, on the ground that the Government's failure to take reasonable measures to insure the informant's safety or to allow defense counsel to preserve his testimony precluded the defense of entrapment appellant intended to raise. The District Court's denial of this request requires reversal and

dismissal of the indictment.

While this Court has previously indicated that the Government is not the "guarantor" of an informant's appearance at trial, see, e.g., United States v. White, 324 F.2d 814, 816 (2d Cir. 1963); United States v. Ortega, 471 F.2d 1350, 1358-1939 (2d Cir. 1972), the defense is entitled to the Government's cooperation in securing his presence and availability. United States v. Ortega, *supra*, 471 F.2d at 1358 n.2; United States v. D'Angiolillo, 340 F.2d 453, 455 (2d Cir.), *cert. denied*, 380 U.S. 955 (1965). This is especially critical where, as here, the defense is attempting to explore and develop the facts relevant to a claim of entrapment for a first offender such as appellant. See Velarde-Villarreal v. United States, 354 F.2d 9, 12, 13 (9th Cir. 1965); see also United States v. Super, 492 F.2d 319, 322-323 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974).

Here, the Government's action effectively precluded the investigation and preparation of this defense, even after counsel had advised the Government of the informant's importance and even after threats had been made on the informant's life. In light of these circumstances, the Government's failure to protect the informant sufficiently or permit the defense to preserve his testimony* requires reversal of the judgment

*While the Government did offer to arrange for the informant to enter the United States Marshal's Witness Protection Program, this was insufficient. Rather, the informant should have been held as a material witness or made available to the defense so that the defense could have perpetuated his testimony.

and dismissal of the indictment.*

*If dismissal of the indictment is denied, it is appellant's position that in any event a new trial should be granted where the informant's recorded statements should not be allowed in evidence. Thus, the Government should not be permitted to take advantage of its failure to preserve the informant's availability or permit the defense to do so.

Point III

THE TRIAL JUDGE'S FAILURE TO INSTRUCT
THE JURORS ON VOICE IDENTIFICATION,
AND HIS IMPROPER RESPONSE TO THE JURORS'
REQUESTS REQUIRE REVERSAL.

A. The failure of the District Court to instruct the jurors about how they were to determine the question of voice identification requires reversal.

The question of whether the Government has satisfied its burden of proving voice identification is an issue for the jury's determination. United States v. Albergo, 539 F.2d 860 (2d Cir. 1976); United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), cert. denied, 417 U.S. 944 (1974); United States v. Borrone-Iglar, 468 F.2d 419, 421 (2d Cir. 1972). Thus, the jurors must be instructed as to how they are to decide the question and the relevant legal criteria to be applied. See, e.g., United States v. Clark, 475 F.2d 240, 251 (2d Cir. 1975); see also United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972); cf. United States v. Fernandez, 456 F.2d 638, 643-644 (2d Cir. 1972); United States v. Barber, 442 F.2d 517, 526-528 (3d Cir. 1971).

Here, defense counsel requested specific instructions with respect to voice identification,* a crucial question in

*While defense counsel asked that the jurors be told, *inter alia*, that they had to be convinced of the voice identification beyond a reasonable doubt, an instruction that the Government had the burden of proof on this question was implicit.

this case (see Point I, supra). While the judge did tell the jurors that there was a dispute about whose voices were on the tapes (T.459), this instruction failed to tell them that the burden of proof was on the Government or to provide any guidance about the proper way the jurors were to determine the issue. Thus, for example, the jurors should have been instructed that in considering the voice identification on the tapes, they were to consider the opportunity the witness had to hear the voice; the certainty of the witness' identification; the effect, if any, cross-examination had on the witness' testimony; and the length of delay between a hearing of the actual voice and listening to the tapes. E.g., cf. United States v. Telfaire, 469 F.2d 552, 558-559 (D.C. Cir. 1972); United States v. Barber, supra.

Instructions on the question were necessary for the jurors' fair evaluation of the Government's proof. The District Court's failure to guide the jurors on the issue was error, requiring reversal.

B. The District Court's failure to re-read the testimony of Valentine and Cruz requires reversal.

In two separate notes submitted to the judge during the jurors' deliberations, the jurors made clear their desire to have re-read the testimony of Valentine and Cruz. Without explaining his reasons for refusing this jury request, the District Court, over defense objection, declined to have the testimony read back, but instead requested that the jurors

submit yet a third note if they still required this evidence. This procedure was improper, requiring reversal.

A reasonable request for review of trial testimony should never be refused.

Whenever the jury's request is reasonable, the court ... shall have the requested parts of the testimony read to the jury and shall permit the jury to reexamine the requested materials admitted into evidence.

ABA Standards Relating to the
Administration of Criminal
Justice, Trial by Jury, §5.2
(a) at 136, cited approvingly
in United States v. Pollack,
474 F.2d 828 (2d Cir. 1973).

See also United States v. Gentile, 525 F.2d 252 (2d Cir. 1975),
cert. denied, 425 U.S. 903 (1976).

Indeed, even where the jurors' request is to have read confusing or incomplete portions of trial testimony, compelling the judge to exercise some discretion, including how much additional material ought to be read to the jurors, this discretion is extremely limited. See, e.g., United States v. Pollack, supra, 474 F.2d at 828, 832; United States v. Price, 447 F.2d 23, 31 (2d Cir. 1971); United States v. DePalma, 414 F.2d 394, 396-397 (9th Cir. 1969), cert. denied, 396 U.S. 1046 (1970).

This approach is justified on the ground that the fair administration of justice requires that jurors resolve their doubt about testimony by having it re-read. See ABA Standards at -136. Thus, "the court must grant the jury's request

to review certain evidence when that evidence directly relates to an issue before the jury." ABA Standards at 137, emphasis in the original.

Here, the jurors twice requested a re-reading of the testimony of Valentine and Cruz. Obviously, the jurors were interested in this testimony because they either could not remember it or because they found a conflict that required its review. In any event, the jurors must have believed that the testimony would have been helpful to their determination of the elements in the case, and they were correct, since this proof was directly relevant to guilt or innocence. The District Court's unreasoned refusal to have this testimony re-read, in disregard of the jurors' expressed desire, was error.* Reversal of the judgment is thus required. See United States v. Rabb, 453 F.2d 1012, 1014 (1st Cir. 1971).

*As defense counsel argued, the refusal to read the testimony may also have indicated to the jurors that the judge considered the evidence unimportant, an apparent conflict with the jurors' appraisal of the testimony.

C. The submission of a magnifying glass to the jurors during their deliberations was error, requiring reversal.

In the course of their deliberations, after receiving photographs which had been admitted in evidence during the trial, the jurors asked for a magnifying glass with which to examine that proof. The District Court's compliance with this request, over defense objection, requires reversal.

The Government chose to introduce the photographs without magnification, arguing that the pictures showed appellant leaving 195 Stanton Street counting money (T.391). Defense counsel framed his response to this proof in light of the evidence as it then appeared, specifically disputing the Government's claim and contending that the jurors themselves should decide what was in the photograph (T.426).

However, the jurors' use of a magnifying glass during their deliberations changed the nature of the evidence presented by the Government while depriving defense counsel of the opportunity to defend against the modification. Thus, this procedure violated the "fundamental" principle that a jury may consider only material that has been received in evidence, United States v. Adams, 385 F.2d 543, 550-551 (2d Cir. 1967); see also United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975); United States v. Frattini, 501 F.2d 1234, 1236 (2d Cir. 1976), and precluded a response by the

defense to the altered proof, requiring reversal of the judgment.*

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the indictment dismissed; in the alternative, a new trial must be ordered.

Respectfully submitted,

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*While there is authority upholding the propriety of supplying a jury with a magnifying glass, see Wharton, CRIMINAL EVIDENCE, Vol. III, §624 at 233 (1973); Taylor v. Reo Motors, Inc., 275 F.2d 699, 706 (10th Cir. 1960), it is appellant's position that those cases should be rejected.

CERTIFICATE OF SERVICE

June 1, 1977

I certify that a ^{corrected} copy of this brief and Appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathan J. Silberman